ought to be inferred, then of course the presumption arises that in the contract of employment a new term had been introduced by consent of both parties. The former ground for summary dismissal would have disappeared once the new term had been agreed upon. Considered in this light, I think the answer is clear. The employer did not accept their refusal; on the contrary, he had told them they might as well go if they would not keep the record as required. They persisted in their wrongful refusal, and after the third day it was apparent that the employer's ultimatum "Keep the record or go" had gone unheeded. The refusal was a continued act of wilful disobedience to the lawful and reasonable order of the employer. It therefore justified summary dismissal each day the disobedience was persisted in. The question of condonation accordingly did not arise, though, had it arisen, it would have to be considered whether condonation can be said to apply to a case of wilful disobedience of a lawful order, as distinguished from misconduct.

I would allow the appeal and set aside the order of the Junior Assistant Commissioner for Labour.

Appeal allowed.

Solicitors: *Braddell & Ramani.*

CHAN CHWEN KONG v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) May 3, 1962]

[Penang — F.M. Criminal Appeal No. 13 of 1962]

Criminal Law and Procedure — Murder — Circumstantial evidence — Child evidence — Misdirection.

The appellant was convicted for the murder of a woman and her child and was sentenced to death. It was argued on appeal that: (i) the evidence was entirely circumstantial; (ii) the trial judge dealt with the need for corroboration of the evidence of the child witnesses unsatisfactorily; (iii) the trial judge misdirected the jury by suggesting to them that the evidence of the defence is to be regarded and evaluated in isolation and that if that fails to come up to some standard proof is to be discarded.

Held: (1) in cases where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope;

(2) although the trial judge did not administer the necessary caution to the jury as suggested in *Chao Chong* v. *Public Prosecutor* (1), nevertheless the Court was not prepared to say that the terms in which he did administer the caution was wrong;

(3) the suggestion of the learned trial judge that the evidence for the defence is to be evaluated in isolation and that if it fails to come up to some standard proof it is to be discarded is beyond the authorities. However in this case if the jury had been properly directed they would have inevitably come to the conclusion that the prisoner was guilty of both murders and therefore the case was one which came within the scope of section 29(2) of the Court Ordinance, 1948, and the appeal should be dismissed.

Cases referred to:—

(1) *Chao Chong* v. *Public Prosecutor* [1960] M.L.J. 238.

(2) *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372.

(3) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462, 481, 482.

(4) *Murtagh and Kennedy* 39 Cr. App. R. 72.

COURT OF APPEAL.

Lee Kok Liang for the appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted at Johore on 22nd April this year for the murder of a woman and her child and was sentenced to death. He has appealed against his convictions.

We have had the benefit of listening to a very thorough and very persuasive argument from counsel for the appellant for which we are grateful because we have derived much assistance from it. I trust it will not be taken as detracting from that in any way if I say that in our opinion all the grounds of appeal that have been urged upon us are with one exception of little substance.

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

Again there has been some criticism, not entirely without justification, of the way in which the trial Judge dealt with the need for corroboration of the evidence of two child witnesses. It is unfortunate perhaps that he did not see fit to administer the necessary caution to the jury in the way suggested by us in the case of *Chao Chong* v. *Public Prosecutor* (1). Nevertheless we are not prepared to say that the terms in which he did administer the caution were wrong.

I now come to the ground of appeal which in our view is of some substance and which has caused us a certain amount of difficulty.

The trial Judge commenced his summing-up with certain observations regarding the onus of proof which, with respect, we would describe as unexceptionable. He pointed out that the jury must be sure of the guilt of the accused person. He pointed out that the onus of proving guilt lay upon the prosecution and that that meant the prosecution must satisfy the jury so that they were sure that the accused was guilty

of the offences with which he stood charged. He went on to discuss the degree of proof that was necessary and described it as proof beyond reasonable doubt and illustrated what he had to say on the point by reading to the jury the well-known passage from Lord Denning's judgment in the case of *Miller* v. *Minister of Pensions* [2]. All that, as has been said, was unexceptionable.

At a later stage, however, (and it is to be remembered that the summing-up lasted for over two hours) when he came to deal with the defence, he made use of an expression which, in our view, was not beyond criticism. This expression was used on a large number of occasions, I think nine in all. It will be sufficient if I refer to one of these. In discussing the evidence given by the appellant which was evidence of an *alibi* he concluded:—

". . . . . if you think that the evidence given by the accused is consistent with the truth then, even though you do not believe it, that is sufficient to bring in a verdict of acquittal."

We are not at all clear as to what these words mean. Indeed I think the only point on which we differ is that among ourselves we take different views as to the possible meaning of these words. That leads to our first criticism which is that they are not calculated to illuminate the minds of a local jury. When we ourselves, who have spent our working lives dealing with the meaning of words, find difficulty in agreeing as to the intention and meaning of these particular words it is difficult to imagine just what impression they would make on the collective mind of a jury.

In the second place, however, and this is a much more fundamental criticism, we are of the opinion that whatever they mean they are calculated to convey an impression that the onus lying on the defence in a criminal case is greater than it truly is. In most criminal cases there is at some stage an onus of a sort upon the accused person. Once the prosecution produces evidence which if believed would support a conviction there is a tactical onus on the accused person either to produce evidence of his own or to point to something in the prosecution evidence that at the very lowest make the trier of fact less than sure of any conclusions he might otherwise be prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted. That is very true.

To suggest, however, that evidence for the defence is to be regarded and evaluated in isolation and if it fails to come up to some standard proof is to be discarded is in our view to go beyond the authorities.

On that I do not think it is necessary to do more than quote the well-known passage from Lord Sankey's speech in the case of *Woolmington* v. *The Director of Public Prosecutions*:— [3]

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

.....

When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

These observations, in our view, are as applicable to a case like the present where the defence was an *alibi* as they were to the case in which they were used where the defence was that the killing must have been either accidental or the result of provocation.

Much the same thing was said 20 years later by the Court of Appeal in the case of *Murtagh and Kennedy* [4]. There it was said that the case was one where it had been essential for the Judge to make it clear to the jury what were three possible positions in which they might find themselves "bearing in mind throughout that it was not for the accused to establish their innocence". One of these positions was that if they accepted the explanation of the accused they must acquit. The second was that if that explanation "left them in doubt they must acquit". The third was that on the whole of the evidence they must be satisfied of the guilt of the accused.

In other words the test is not: "is the defence evidence consistent with the truth?", whatever that may mean, but does it leave the jury in doubt as to the guilt of the accused person? If the answer to that question be "yes" the prisoner is entitled to be acquitted.

Having made these observations the question then arises on their application to the present appeal. This was not a case in which the credibility of the prosecution witnesses was of major importance. The witnesses whose credibility had to be evaluated with one exception spoke to matters of somewhat minor importance. The real question in the case was not whether the witnesses were to be believed but whether

the various circumstances to which they spoke pointed irresistibly in one direction and one direction only, that direction being the guilt of the prisoner. The evidence was discussed at great length and with substantial accuracy by the trial Judge in his charge. We ourselves have read the evidence. We have read it with care and we have come to the conclusion that we can say that had the jury been properly directed they would, and here I return to quote the words of Lord Sankey, "have inevitably come to the same conclusion" that is that the prisoner was guilty of both the murders for which he was tried.

We are accordingly satisfied that the case is one which comes within the scope of the proviso to section 29(1) of the Courts Ordinance and we dismiss the appeals.

Appeal dismissed.

GURUBACHAN SINGH v. SEAGROTT & CAMPBELL

[C.A. (Hill Ag. C.J., Good J.A. and Ong J.) June 12, 1962]

[K.L. — F.M. Civil Appeal No. 16 of 1962]

Appeal — Application to stay until payment of judgment debt and costs — Further security for costs — Insolvency of appellant.

Practice and Procedure — Appeal to Court of Appeal — R.S.C., O.58 rr.15(2) and 21(1) — Difference between English and local procedure.

Costs — Further security — Insolvency of appellant — Act of bankruptcy founded on appellant's failure to satisfy judgment debt.

In this case the appellant was dissatisfied with a judgment of the High Court and wished to appeal. He complied with the Rules, and deposited $500 towards the costs of the appeal. The respondent applied by motion to the Court of Appeal that the appeal be stayed until payment of the judgment debt and costs and that the appellant gives further security for costs. The only ground put forward in the affidavit in support of the motion was that of the appellant's insolvency.

Held: the test would be whether the appeal and the conduct of the appellant are reasonable or not. In this case there was nothing unusual or unreasonable and therefore there was no justification for the Court to grant the application.

Per Good J.A.: "That difference in procedure (between English and local rules) seems to me to make all English authorities that have been cited to us on the second limb of the application totally irrelevant and I do not see any reason for exercising the discretion which is given to us by O.58 r.15(2) to order further security for costs to be given."

Per Ong J.: "the act of bankruptcy in this case is founded on the appellant's failure to comply with a bankruptcy notice requiring him to satisfy the amount of the judgment debt which is the subject matter of the appeal. The judgment debt vanishes in the event of the appellant succeeding in his appeal and any assumption to the contrary is unwarranted. Therefore the applicant has to show that the appellant was doing something more than he was justly entitled to do and that he was doing it needlessly to throw additional costs upon the shoulders of the respondent before he can ask for further security and a stay of the appeal."

COURT OF APPEAL.

Dato R. P. S. Rajasooria for the appellant.

A. L. Hills for the respondent.

Hill Ag. C.J. (delivering oral judgment): This is an application by the respondent in Civil Appeal No: 16 of 1962 that the appeal be stayed until payment of the judgment debt and costs and that the appellant gives further security for the costs of the appeal. For myself and speaking very briefly the test would seem to be whether the appeal and the conduct of the appellant are unreasonable or not.

No deposit for security of costs is required on lodging an appeal in England. In this case the appellant is dissatisfied with a judgment of the High Court and wishes to appeal. He has complied with the rules, he has done nothing that is barred by them and he has deposited $500 towards the costs of the appeal.

Speaking for myself, I see nothing unusual or unreasonable in this and nothing that would justify this Court in granting the application.

I would dismiss the application with costs.

Good J.A. (delivering oral judgment): I agree and will state my reasons very briefly.

In the English practice, Order 58 rule 9(5):

"The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

In the Federation of Malaya Order 58 rule 21(1) there is an obligation placed upon the appellant to deposit $500 as security for costs at the time that he files his notice of appeal. That difference in procedure seems to me to make all the English authorities that have been cited to us on the second limb of the application totally irrelevant and I have been unable to see any reason for exercising the discretion which is given to us by Order 58 rule 15(2) to order further security for costs to be given. There is nothing extraordinary or abnormal in the case that I can see which would justify us in going outside the limits of the ordinary procedure which have been complied with by the appellant. So far as the first limb of the application goes, that is the prayer that the appeal be stayed until the amount of judgment debt and costs already incurred in the Court below have been paid, Mr. Hills has not provided us with any authority demonstrating that we have any power to do that; and speaking for myself I see no justification for seeking to assume such a power.

I therefore would dismiss the application with costs.

Ong J. (delivering oral judgment): I have for my own part a few words to add to what my Lords have said.

I notice that in the affidavit in support of the motion there was nothing said which suggests in any way that the appeal is unreasonable or frivolous or vexatious. The effect of granting this application would be to shut the appellant from his rights to be heard in the Court of Appeal and the only ground that has been put forward in the affidavit is that of his insolvency.